

1 THE HONORABLE JOHN C. COUGHENOUR  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 MARIE CHRISTINE FANYO-PATCHOU,  
14 RODRIGUE FODJO KAMDEM, and  
15 CHRISTIAN FREDY DJOKO,

Defendants.

CASE NO. CR19-0146-JCC

ORDER

16 This matter comes before the Court on Defendants' amended motion to dismiss the  
17 indictment (Dkt. No. 168). Having considered the parties' briefing and the relevant record, the  
18 Court hereby DENIES the motion for the reasons explained herein.

19 **I. BACKGROUND**

20 On August 1, 2019, a federal grand jury indicted Defendants on charges of cyberstalking  
21 in violation of 18 U.S.C. § 2261A(2)(A)–(B) and conspiracy to commit cyberstalking in  
22 violation of 18 U.S.C. § 371. (Dkt. No. 1 at 2–6.) The indictment alleges that Defendants  
23 engaged in a campaign of electronic harassment against U.M., a gay man from Cameroon who  
24 lives in Seattle. (*See id.*) As part of that alleged campaign, Defendants purportedly disseminated  
25 private information about U.M.'s sexual orientation—including nude images of U.M. and his  
26 husband—to the Cameroonian community. (*See id.* at 3–6.) Defendants allegedly committed

1 those acts with the intent to harass or intimidate U.M., and the indictment claims that Defendants  
 2 succeeded in placing U.M. in reasonable fear of serious bodily injury to himself and his  
 3 immediate family members. (*See id.*)

4 Defendants now move to dismiss the indictment, arguing that the Government would  
 5 violate the First Amendment if it applied § 2261A to the facts of this case. (*See* Dkt. No. 168 at  
 6 28–34.) In the alternative, Defendants argue that the charges under § 2261A(2)(B) should be  
 7 dismissed because § 2261A(2)(B) violates the First Amendment on its face. (*See id.* at 9–28.)

8 **II. DISCUSSION**

9 **A. Defendants' As-Applied Challenge**

10 “There is no summary judgment procedure in criminal cases. Nor do the rules provide for  
 11 a pre-trial determination of the evidence.” *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir.  
 12 1996) (quoting *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992)). Instead, Federal  
 13 Rule of Criminal Procedure 12(b) offers defendants a limited mechanism to raise defenses  
 14 pretrial. In assessing a pretrial defense, a court “should not consider evidence not appearing on  
 15 the face of the indictment.” *See id.* (quoting *United States v. Marra*, 481 F.2d 1196, 1199–1200  
 16 (6th Cir. 1973)). A court must also “presume the truth of the allegations in the charging  
 17 instruments.” *See id.* Furthermore, a court may dismiss the indictment only if the defense “can be  
 18 determined without a trial on the merits.” *See* Fed. R. Crim. Pro. 12(b)(3). A defense is capable  
 19 of pretrial determination “if trial of the facts surrounding the commission of the alleged offense  
 20 would be of no assistance in determining the validity of the defense.” *United States v. Covington*,  
 21 395 U.S. 57, 61 (1969); *see, e.g.*, *United States v. Chardón-Sierra*, 2019 WL 3211256, slip op. at  
 22 4 (D.P.R. 2019) (denying an as-applied challenge because the indictment did not include the  
 23 defendant’s claim that her voicemails “criticize[d] . . . the colonial relationship between the  
 24 U.S.A. and Puerto Rico”); *United States v. Edwards*, 291 F. Supp. 3d 828, 833–34 (S.D. Ohio  
 25 2017) (concluding that an as-applied challenge was premature because the challenge required the  
 26 court to review the context of Facebook posts and the defendant’s intent in posting the material);

1 *United States v. Mayfield*, 2017 WL 4325616, slip op. at 2–3 (D. Neb. 2017) (rejecting an as-  
 2 applied challenge because it was up to the jury to look at the context of the defendant’s  
 3 statements to determine if they were true threats).

4 Here, Defendants’ as-applied challenge extensively relies on disputed facts that do not  
 5 appear in the indictment. For example, the indictment says nothing about U.M. committing  
 6 immigration fraud. (*See generally* Dkt. No. 1.) Yet Defendants argue that their decision to post  
 7 illicit images of U.M. was constitutionally protected because those images were, in fact,  
 8 “evidence of a criminal conspiracy as they documented how [U.M.] and his ‘husband’ were  
 9 *posing as a married happy couple.*” (*See* Dkt. No. 168 at 30–31) (emphasis in original). The  
 10 Government disputes that U.M. was in a fraudulent marriage, (Dkt. No. 174 at 4 n.2), and it is up  
 11 to the jury to decide whether the Government or Defendants are correct, *see* Fed. R. Crim. Pro.  
 12 12(b)(3). Accordingly, Defendants’ as-applied challenge is premature, and the Court DENIES  
 13 the challenge without prejudice. *See United Chardón-Sierra*, 2019 WL 3211256, slip op. at 4;  
 14 *Edwards*, 291 F. Supp. 3d 828 at 833–34; *Mayfield*, 2017 WL 4325616, slip op. at 2–3.

15 **B. Defendants’ Facial Challenge**

16 In contrast to Defendants’ as-applied challenge, Defendants’ facial challenge presents a  
 17 question of law that can be determined without reference to extrinsic evidence and without a trial  
 18 on the merits. Accordingly, the Court can and will address that challenge now.

19 Defendants’ facial challenge consists of two separate arguments. First, Defendants argue  
 20 that § 2261A(2)(B) is substantially overbroad because it criminalizes a large amount of protected  
 21 speech, from President Donald Trump’s tweets to cartoonists’ depictions of the Prophet  
 22 Muhammed. (*See* Dkt. No. 168 at 9–19.) Second, Defendants argue that § 2261A(2)(B) is a  
 23 content-based regulation on speech that is subject to and fails strict scrutiny. (*See* Dkt. No. 168 at  
 24 19–28.) The Court concludes that both arguments were either explicitly or implicitly rejected by  
 25 the Ninth Circuit in *United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014).

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1. Overbreadth

To succeed on a First Amendment “overbreadth” challenge, a person must show that “a substantial number of [the challenged statute’s] applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). This standard is exacting: the Supreme Court has said that the overbreadth doctrine should be employed “only as a last resort,” *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), and that “[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech.”

*Virginia v. Hicks*, 539 U.S. 113, 124 (2003).

In *Osinger*, the Ninth Circuit rejected an overbreadth challenge to the 2006 version of § 2261A. At the time, the statute imposed criminal penalties on anyone who

with the intent . . . (A) to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress to a person in another State or tribal jurisdiction or within the special maritime and territorial jurisdiction of the United States . . . uses the mail, any interactive computer service, or any facility of interstate or foreign commerce to engage in a course of conduct that causes substantial emotional distress to that person or places that person in reasonable fear of the death of, or serious bodily injury to, [that person, a member of the immediate family of that person, or a spouse or intimate partner of that person].

18 U.S.C. § 2261A(2)(A) (2006). The Ninth Circuit concluded that the statute was not substantially overbroad because it criminalizes a “course of *conduct*,” thereby making “the proscribed acts . . . tethered to . . . underlying criminal conduct and not to speech.” *Osinger*, 753 F.3d at 944 (emphasis in original). In addition, the Ninth Circuit found it “difficult to imagine what constitutionally-protected speech would fall under [the statute’s] prohibitions” given that “the statute requires both malicious intent on the part of the defendant and substantial harm to the victim.” *Id.* (quoting *United States v. Petrovic*, 701 F.3d 849 (8th Cir. 2012)).

The Court is, of course, required to apply controlling Ninth Circuit precedent. *See Hart v.*

*Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001). And on its face, *Osinger* would seem to control here. However, Defendants argue that *Osinger* does not dictate the outcome in this case for three reasons. First, Defendants claim that the 2013 amendments to § 2261A broadened the statute to such an extent that *Osinger* no longer applies. (See Dkt. No. 168 at 13–14.) Second, Defendants claim that recent Supreme Court decisions have “cast [*Osinger*] into doubt.” (See Dkt. No. 181 at 9.) And third, Defendants invite the Court to reconsider *Osinger* and “conduct the . . . overbreadth test anew.” (*Id.* at 3.) The Court finds none of these reasons persuasive.

i. *Changes to § 2261A*

In 2013, Congress amended the relevant portions of § 2261A to read as follows:

Whoever . . . (2) with the intent to kill, injure, harass, *intimidate*, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or *electronic communication service or electronic communication system* of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that—

• • •

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to [that person, an immediate family member of that person, or a spouse or intimate partner of that person],

Shall be punished as provided in section 2261(b) of this title.

18 U.S.C. § 2261A(2)(B) (I Supp. II 2013–2015) (emphasis added). In amending § 2261A, Congress changed the statute’s intent requirement by adding “intimidate” and removing “cause substantial emotional distress.”<sup>1</sup> Congress also clarified that two facilities of interstate or foreign commerce—“electronic communication service[s]” and “electronic communication system[s]”—

<sup>1</sup> The amended statute also refers to “course[s] of conduct . . . that . . . attempt[] to cause . . . substantial emotional distress.” 18 U.S.C. § 2261A(2)(B). The meaning of this language is unclear. Perhaps when Congress referred to “course[s] of conduct” “attempting” to achieve a certain goal, Congress meant to refer to the defendant’s intent. However, Defendants do not discuss how Congress changed the intent requirement in § 2261A. Accordingly, the Court does not take a position that language’s meaning.

1 are expressly covered by the statute.<sup>2</sup> In addition, Congress eliminated the requirement that a  
 2 defendant direct their course of conduct towards “a person in another State or tribal jurisdiction  
 3 or within the special maritime and territorial jurisdiction of the United States.” Congress also  
 4 broadened the statute to cover scenarios where the defendant’s behavior causes (or would be  
 5 expected to cause) substantial emotional distress to certain people besides the defendant’s  
 6 intended victim. Finally, Congress prohibited courses of conduct that “would be reasonably  
 7 expected to cause substantial emotional distress” even if the course of conduct does not actually  
 8 cause such distress.

9 Defendants focus on this last change, arguing that it broadens § 2261A(2)(B) to such an  
 10 extent that *Osinger* is no longer good law. (See Dkt. No. 168 at 13–14.) Yet *Osinger* focused on  
 11 two core elements of § 2261A that Congress retained: the statute still prohibits “courses of  
 12 conduct” and still requires “malicious intent.” See 753 F.3d at 944. According to *Osinger*, these  
 13 elements tether the statute’s proscribed acts to conduct, not speech, and make it “difficult to  
 14 imagine what constitutionally protected speech would fall under [the statute’s] prohibitions.” *Id.*  
 15 Given that these elements remain the same, the Court cannot say that the statute now excessively  
 16 targets protected speech simply because Congress broadened the statute to cover courses of  
 17 conduct that are reasonably expected to but do not actually cause substantial emotional distress.  
 18 While the statute is broader, its fundamental nature—as construed by the Ninth Circuit in  
 19 *Osinger*—remains the same.<sup>3</sup>

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20 <sup>2</sup> In all likelihood, these facilities were already covered by the 2006 version of the statute, which  
 21 applied to courses of conduct that used “any interactive computer service[] or any facility of  
 22 interstate or foreign commerce.” 18 U.S.C. § 2261A (2006).

23 <sup>3</sup> The Court admits that it is skeptical of how *Osinger* construed § 2261A. The Court struggles to  
 24 see how the phrase “course of conduct” uniquely focuses the statute towards conduct rather than  
 25 speech. After all, a course of conduct is defined as “a pattern of conduct composed of 2 or more  
 26 acts, evidencing a continuity of purpose,” 18 U.S.C. § 2266(2), and nothing in § 2261A(2)(B)  
 prevents that “pattern of conduct” from being composed of two or more acts of speech—as this  
 case shows. Moreover, the Court does not find it “difficult to imagine” a pattern of speech that is  
 constitutionally protected even if it is both intended to harass and either causes or could  
 reasonably be expected to cause substantial emotional distress. People often viciously harass

1                   *ii.       Recent Supreme Court Decisions*

2           Defendants cite to several Supreme Court cases decided after *Osinger* and suggest that  
 3 the Court should follow those cases instead of *Osinger*. (See Dkt. Nos. 168 at 14, 181 at 9, 190 at  
 4 3.) However, none of those cases involved an overbreadth challenge, a law that regulated a  
 5 “course of conduct,” or a law that contained a “malicious intent” requirement similar to the one  
 6 found in § 2261A(2)(B). Instead, those cases addressed the following issues: (1) whether  
 7 regulations of “professional speech” should be subject to a lower level of scrutiny, *Nat'l Inst. of*  
 8 *Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371–76 (2018); (2) whether ordinary  
 9 “rule[s] of construction” dictate that 18 U.S.C. § 875(c) contains a scienter requirement, *Elonis v.*  
 10 *United States*, 135 S. Ct. 2001, 2009–13 (2015) (“Given our disposition, it is not necessary to  
 11 consider any First Amendment issues.”); and (3) whether Congress could generally bar robocalls  
 12 while specifically allowing robocalls “made solely to collect a debt owed to or guaranteed by the  
 13 United States,” *Barr v. Am. Assoc. of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346–47 (2020)  
 14 (quoting 42 U.S.C. § 226(b)(1)(A)(iii)). In addressing those issues, the Supreme Court neither  
 15 explicitly nor implicitly overruled *Osinger*. Consequently, the Court must follow *Osinger* until a

16  
 17 others with words that do not rise to the level of true threats, are not defamatory, and do not fall  
 18 under any other category of unprotected speech. One need only look to the internet for countless  
 19 examples. See Jessica Guyn, *If You've Been Harassed Online, You're Not Alone. More than Half*  
 20 *of Americans Say They've Experienced Hate*, USA Today (Feb. 13, 2019, 6:00 a.m.),  
<https://www.usatoday.com/story/news/2019/02/13/study-most-americans-have-been-targeted-hateful-speech-online/2846987002/> (“More than half of Americans—53 percent—say they were  
 subjected to hateful speech and harassment in 2018.”).

21           But the Court’s view about § 2261A is not what matters. What does matter is that the  
 22 Ninth Circuit already held that § 2261A is not overbroad. See *Osinger*, 753 F.3d at 944. The  
 23 Court must respect that holding, and the Court will not use the slight changes to § 2261A as an  
 excuse to impose the Court’s own view. As the Ninth Circuit has explained,

24           Binding authority . . . cannot be considered and cast aside; it is not merely evidence  
 25 of what the law is. Rather, caselaw on point *is* the law. If a court must decide an  
 26 issue governed by a prior opinion that constitutes binding authority, the later court  
 is bound to reach the same result, even if it considers the rule unwise or incorrect.

*Hart*, 266 F.3d at 1170.

1 higher court says otherwise.

2                   *iii. Conducting the Overbreadth Analysis Anew*

3                   Finally, Defendants ask the Court to conduct the overbreadth analysis anew. (*See* Dkt.  
 4 No. 181 at 3.) The Court declines Defendants' invitation. For even if the Court believed that  
 5 *Osinger* misinterpreted § 2261A or misapplied Supreme Court precedent, the Court must follow  
 6 *Osinger* "unless and until overruled by a body competent to do so." *Hart*, 266 F.3d at 1170.

7                   2. Strict Scrutiny

8                   Defendants also suggest that the Court may freely hold that § 2261A(2)(B) fails strict  
 9 scrutiny because *Osinger* did not address whether § 2261A is a content-based regulation subject  
 10 to strict scrutiny. (*See* Dkt. No. 168 at 14–15, 19–28) (arguing that *Osinger* is distinguishable  
 11 because "[Defendants] arguments here are different than those raised in *Osinger*"). Admittedly,  
 12 the precise difference between strict scrutiny analysis and the overbreadth doctrine is anything  
 13 but clear. *See Parallel Doctrinal Bars: The Unexplained Relationship Between Facial*  
 14 *Overbreadth and "Scrutiny" Analysis in the Law of Freedom of Speech*, 11 Elon L. Rev. 95,  
 15 110–22 (2019). But whatever the precise difference may be, the Supreme Court has said that a  
 16 law is subject to and fails strict scrutiny only if the law "in all its applications directly restricts  
 17 protected First Amendment activity and does not employ means narrowly tailored to serve a  
 18 compelling governmental interest." *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467  
 19 U.S. 974, 965 n.13 (1984). *Osinger* rejected the idea that § 2261A "in all its applications directly  
 20 restricts protected First Amendment activity"; indeed, *Osinger* concluded that § 2261A primarily  
 21 regulates conduct, not speech. *See* 753 F.3d at 944. Thus, *Osinger* forecloses Defendants'  
 22 separate facial challenge even though *Osinger* did not expressly address whether § 2261A is a  
 23 content-based regulation on speech that is subject to strict scrutiny. The Court therefore DENIES  
 24 Defendants' facial challenge.

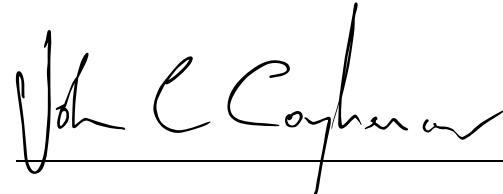
25                   **III. CONCLUSION**

26                   For the foregoing reasons, the Court DENIES Defendants' motion to dismiss the

1 indictment (Dkt. No. 168). The Court also DENIES as moot Defendants' previously filed motion  
2 to dismiss (Dkt. No. 138).

3 DATED this 19th day of August 2020.

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John C. Coughenour  
UNITED STATES DISTRICT JUDGE